Monsanto

FROM (NAME & LOCATION) K. Fletcher - Law Department - Brussels

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cc C.P. Cunningham - St. Louis

SUBJECT PCBs

REFERENCE KF/CB

TO : J. Stapleton - St. Louis

In the light of the decision taken on November 18, 1971 to discontinue with effect in Europe from January 31, 1972 further sales of PCB containing fluids, one particular problem has arisen in Europe, namely the sale of PCB containing Pydraul to coal mining companies in Germany.

These hydraulic fluids have been sold to German coal mining companies for six years. The fluids received the approval of the German State Mining Authority after testing for toxicological and other technical purposes on behalf of thise authorities by the Technical Supervisory Association of North-Rhein-Westfalen (NRW).

Some time ago the problem of toxicity and pollution possibly attendant on the use of these fluids was recognised by the German Mining Authorities, the body statutorily charged with responsibility for safety of mines, mine workings and equipment for the protection not only of mining employees but also of the German public. As a result a program of official testing and approval of new fluids to be supplied by Monsanto was commenced.

In early January representatives of the Special Products Business Group in Brussels and myself visited the principal German State Mining Authority, that for NRW to advise of latest technical and legal developments and of the recent management decision taken.

In the light of this information the Mining Authorities advised us that they could not give us an indemnity to afford us protection in the event of continuing supplies, since their constitution would not permit them to do this. However, they continued to recommend that PCB containing fluids should continue to be used in the mines in lieu of untested alternative products so as to avoid the risk of fire. Prior to the introduction of the present fluids, the German mines had suffered a series of

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very serious fires resulting in loss of many miners' lives.

The German Mining Authority for NRW advised that they would send us a letter confirming their continued approval of PCB containing fluids notwithstanding the toxicity and pollution problems that might be attendant on their use and this letter is expected shortly.

In the light of such a confirmation the German Mining Authorities' lawyer advised us that he did not consider we would be legally liable to third parties in Germany if pollution occured by reason of escape from coal mines of PCBs provided that the consuming coal mining companies had been warned of hazards entailed in these products' continued use.

Subsequent to this we sought the opinion of our outside German legal counsel who advised that while German law did not impose on producers of chemicals any strict liability for damages owing from their use or misuse, the possibility of Monsanto incurring liability to third parties if we continued to sell PCBs could not be excluded. He arrived at this conclusion because of the fact that notwithstanding warnings of the use and disposal of PCBs and formal approval by the mining authority of these products, it is not "technically possible" that PCBs used as hydraulic fluids in coal mines do not escape into the environment.

Our German lawyer advised that the German Mining Authorities' recent approval of relevant Pydrauls would of itself be no answer to the third parties' claims. He agrees however that if we were sued by a third party we could bring the Authority into court as a co-defendant on the grounds that they had recommended continuing use of these products despite knowledge of their hazards. In such instance it is considered by us in Brussels and also by our German counsel that a German judge would be placed in a difficult situation were he to seek to hold Monsanto liable for negligence while exempting the German State Authority from liability.

I am advised that it would be "technically possible" for German coal mines to ensure that PCBs do not escape into the environment by ensuring that any waste PCBs are collected by the companies and disposed of by incineration. Whether it is economically practical for the mining companies to take all

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measures necessary to that effect e.g. by creating bunds around individual hydraulic fluids is a matter for the purchasing coal mining companies to consider. For our part we would ensure that coal mining companies purchasing PCBs containing Pydrauls are made aware and acknowledge the necessity of taking measures recommended by the German Mining Authorities. The measures so recommended are to include an obligation to ensure that PCBs are enclosed in leakproof manner and disposed of safely. For the latter purpose we proposed to advise customers of the service for disposal by incineration which Monsanto can offer, having made appropriate arrangements to this effect last year for use of the only sufficiently high-fired incinerator available in Europe.

PCB containing Pydrauls are sold by us in Germany through distributors of whom two, namely Mobil and Aral have contracts the conditions of which provide that we cannot without their agreement cease to supply before, in the case of Mobil June 1974, and in the case of Aral December 31, 1972. Mobil in particular intimated, so far only verbally, that should we cut off further supplies they would claim against us damages.

Since the program of formulation and testing of new hydraulic fluids is already under way with the Mining Authorities for NRW and the Technical Research Institute for NRW, and continuing sale of PCB containing Pydraul is therefore contemplated to be an interim problem only, the European special products group would be obliged if Mr. Cunningham would give his approval to contiuing sale of such PCBs to German coal mining companies until such reformulated products approved by the German Mining Authorities are ready for sale and if such approval for continued sale could be given even if we cannot obtain indemnities from our German distributors or mining companies to whom they sell.

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